

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

In the Matter of

L & L CONSTRUCTION ASSOCIATES, INC.

Employer

And

Case 5-RC-15177

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL NO. 77, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein call the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. L&L Construction Associates, Inc. (herein “the Employer” or “the Company”), a District of Columbia corporation with an office and place of business located in Upper Marlboro, Maryland, is engaged in the business of excavating and providing site utilities. During the past twelve months, a representative period, the Employer has received gross revenues in excess of \$500,000. During the same period, the Employer has purchased and received at its Upper Marlboro facility, materials and supplies in excess of \$5,000 directly from points located outside the State of Maryland. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act.

International Union of Operating Engineers, Local No. 77, AFL-CIO (herein “the Petitioner” or “the Union”) filed a petition seeking to represent a unit of all heavy equipment operators and mechanics employed by the Employer in the D.C. Metropolitan Area, but excluding all other employees, guards and supervisors as defined in the Act. The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Employer contends the unit should consist of “operators and operators/foremen,” which would include five employees: Oscar Pineda, Omar Pineda, Gregory Teague, Earl Rogers and Ron Stewart. Specifically, the Employer asserts that Oscar and Omar Pineda (sometimes herein collectively “the Pinedas”) and Teague are operators/foremen while Rogers and Stewart are operators. The Petitioner contends that the Pinedas should be excluded from the unit as they are not heavy equipment operators, but agrees that Teague should be included in the petitioned-for unit. There is no history of collective bargaining for any of these employees.

Employer’s Operations

The Employer serves as a site utility contractor that performs storm, sanitary, water line and duct bank installation. In addition, the Employer installs pre-cast retaining walls and sound walls. The Employer employs about 18 individuals total, including a vice-president/general manager, 2 project managers or superintendents, a general foreman,¹ an engineer, 5 heavy equipment operators (including the operators/foremen) and 6 laborers.² As noted above, the only employees at issue here are the operators and operators/foremen.

The employees at an Employer’s job site are set up in crews. A crew generally consists of an operator/foreman, an operator and one or two laborers. Operators use various equipment such as excavators, backhoes, tire backhoes, loaders, dozers and rollers. Typically, one operator is on the backhoe and another operator is on the loader. The Employer utilizes an outside mover to transport the heavy equipment to its job site. Employees also use hand tools such as shovels, rakes, hoes, hammers, trowels, levels and laser beams.

Vice-President/General Manager Dennis Campbell described the general process a crew goes through in installing or laying pipe on a typical job. An operator first uses a track excavator

¹ The parties stipulated at the hearing that the two project managers and general foreman are supervisors as defined under Section 2(11) of the Act.

² Vice-President/General Manager Campbell testified that Manuel Leiva and his wife work in the Employer’s office but their job titles are unknown.

or rubber tire backhoe to dig a hole, called a manhole, wherein a laser beam is set up to establish a line and grade in the trench to another manhole. The operator then uses the excavator or backhoe to dig the trench. After the trench is dug, gravel is placed in the trench by an operator using a backhoe or front-end loader. Once the gravel is placed in the trench, it is re-graded to line up with the laser. Multiple pipe is then placed in the trench by the excavator. There is usually one person who hooks the pipe to the excavator, which the operator then uses to drop the pipe into the trench. Sometimes the operator may have to get off the excavator to hook the pipe to the excavator himself. Laborers inside the trench then attach the pipe together and connect it to the end points of the manholes. While an operator is in the equipment digging the trench, the laborers on the ground may be mixing up “mud,” or carrying materials to the excavation site. After the pipe is connected, the trench is backfilled, or covered up with dirt, using a front-end loader or excavator. As the trench is being backfilled, another employee, the operator/foreman or a laborer, compacts the dirt with a roller, a Rammax, which is a piece of compaction equipment, or a jumping jack. The number of trenches being dug at the same time varies on the project.

The Employer does not require its employees to undergo any special type of training to operate the equipment. There is no evidence of any apprenticeship program. Employees are generally not on a piece of equipment for eight hours a day or for a significant period of time as they routinely get off the equipment to use hand tools.

Operators/Foremen

Oscar Pineda, Omar Pineda and George Teague serve as operators/foremen for the company. Oscar and Omar Pineda have been employed by the Employer for 15 and 16 years, respectively. George Teague has been employed by the company for about ten years. The operators/foremen each direct a crew and, according to Vice-President/General Manager Campbell, do whatever is necessary to get the job done, which may include operating the equipment, setting up the laser beam, getting the gravel or cutting pipe. Campbell testified that all of its employees, including the laborers, are skilled and need little direction. The Pinedas and Teague basically operate all of the same equipment used by the operators. Oscar Pineda estimated that he spends about 50% of this time operating equipment and that he does labor work as well. He further testified that there was no difference between his job and that of Teague.

Omar Pineda testified that he operates mostly backhoes, rollers and front-end loaders. Omar Pineda said the amount of time he spends operating the equipment varies from job to job. He testified that he has been on jobs where he operates equipment less than 20 percent of his time and others when he is on the equipment 100 percent of the time. On one job called “Naylors Road” that lasted a couple of years, Omar Pineda testified that he operated equipment 50 percent of the time. On that particular job, he said he operated the rubber tire front-end loader and scratcher or small backhoe. Omar Pineda further testified that Teague also operated equipment on the Naylors Road job.

The Pinedas do not, nor does Teague, have the power to hire or fire employees or effectively recommend those actions. General foreman Hector Leiva and Manuel Leiva have that authority, as do superintendent Joe Kitka and project manager Jim Higgins. Employees do

not wear a uniform, although the Employer provides them with hard hats. Generally, the operators/foremen wear white hats and the laborers wear red hats. It is not clear what color hat the operators wear. The Pinedas and Teague are responsible for filling out and turning in the time cards or sheet for their respective crews every week, but they do not have the authority to give employees time off. Other than the recording of time worked by employees on their crews, Campbell could not think of any duties that distinguished the Pinedas from Rogers and Stewart.

Dulles Airport Job

Since about September 2000, the Employer has been working at a job at Washington Dulles Airport (herein “the Dulles job”) involving a parking garage.³ Three crews have been used at the Dulles job. Oscar Pineda testified that he operates heavy equipment about fifty percent of the time while Omar Pineda testified that he spends less than twenty percent of his time on the equipment at the Dulles job. Omar Pineda has not operated any excavating equipment to dig trenches or lay pipe, but has operated equipment to backfill the trenches. The other 80 percent of the time, Omar Pineda said he lays pipe and acts as another set of eyes for the operator by helping the operator avoid hazards, i.e. unmarked utilities that are underground. Omar Pineda said he also may be hooking pipe to the excavator or working in the trench smoothing the gravel.

Operator Earl Rogers has been with the Employer since about mid-November 2000 and has worked about every week at the Dulles job. He has run all of the working equipment of the Employer, digging trenches and laying pipe. Rogers has worked on Omar Pineda’s crew more than ten times. Rogers testified that at the Dulles job, he has never seen Omar Pineda operate a piece of equipment other than to move it. In that instance, he saw Omar move a JBC scratcher or backhoe out of the way, which only took a minute. However, Rogers said the Dulles job site was big, covering about one third of the airport, and that it was possible that he could be on the other side of the site and not see if Omar Pineda was operating the equipment. Rogers later testified that he has seen Omar Pineda operate a roller and the Bumax compaction equipment. The time he saw Omar Pineda on the roller, Rogers said Omar Pineda was on it for about twenty minutes and then a laborer began running it. Rogers further said he has seen Oscar Pineda and George Teague operate the equipment basically every day.

Interchangeability

As discussed above, the operators/foremen operate the same equipment to dig trenches and lay pipe just as the operators. There was no evidence presented that operators Stewart or Rogers ever act as foremen. Further, the Employer apparently has no formal system whereby an operator advances to an operator/foreman position. Campbell said that an operator could be promoted to an operator/foreman but that for some reason the operators typically choose not to.

³ The Dulles job was the only active job of the Employer at the time of the hearing.

Terms and Conditions of Employment

The operators/foremen are paid a salary and receive health benefits, while the operators are paid an hourly wage and do not get health benefits. Operators Rogers and Stewart receive \$14.00-15.00 and \$16.00 per hour, respectively. The Pinedas' salary works out to be \$21.25 per hour each, and Teague's salary is equivalent to \$22.00 per hour. The operators/foremen and Stewart each have a company pick-up truck that they can take home. The operators and operators/foremen generally work from 7:00 a.m. to 3:30 p.m. daily. Salaried employees are guaranteed at least 40 hours of work per week.

Employer's Position

The Employer contends that the Pinedas, Teague and the operators perform the same work and should all be included in the unit found appropriate.

Petitioner's Position

The Petitioner contends that the issue here is one of functionality – whether or not the Pinedas perform the work of an operator. However, at the conclusion of the hearing, the Petitioner seemed to question only whether Omar Pineda performed the work of an operator. Also, during the hearing the Petitioner suggested that the foreman status and pay structure of the operators/foremen compared to that of the operators, raise community of interest questions.

Analysis and Conclusions

While the Act does not fix specific standards for making unit determinations, the Board has developed a number of criteria to use in representation cases. Foremost is the principle that mutuality in wages, hours, and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit. *Continental Baking Co.*, 99 NLRB 777, 782 (1952). Community of duties and interests of the employees involved is the determinant. *Swift Co.*, 129 NLRB 1391 (1960). As stated by the Board in *Continental Baking*:

In deciding whether the requisite mutuality exists, the Board looks to such factors as the duties, skills, and working conditions of the employees involved, and especially to any existing bargaining history.

Id. at 782-783.

The community of interest test also considers factors such as the degree of functional integration, *Atlanta Hilton & Towers*, 273 NLRB 87 (1984); common supervision, *Associated Milk Producers*, 251 NLRB 1407 (1980); employee skills and functions, *Phoenician*, 308 NLRB 826 (1992); interchange and contact among employees, *Associated Milk Producers*, supra; and general working conditions and fringe benefits, *Allied Gear & Machine Co.*, 250 NLRB 679 (1980).

I find that the Pinedas perform the work of operators and that they share a community of interest with the operators and operator/foreman Teague, whom the Petitioner would include in the unit. In this regard, the Pinedas operate the same equipment utilized by the operators and Teague in digging trenches and laying pipe. While the amount of time the Pinedas spend on the equipment varies from job to job, it is clear they possess the requisite knowledge and skills regarding the equipment. Although the Pinedas have some additional duties due to their foremen status, as does Teague, they work with the operators on the same jobs, for the same hours, doing mainly the same functions. Further, there is no contention, nor is there sufficient evidence to establish, that the Pinedas are supervisors under the Act. Significantly, there appears to be no difference between the Pinedas' functions and that of Teague, whom the Petitioner seeks to include in the unit. Finally, while the Pinedas are salaried and receive health benefits that the operators do not, such factors are not an adequate basis to overcome the elements of functional integration, common skills and functions, and frequent contact and interchange present here. See *K.G. Knitting Mills*, 320 NLRB 374 (1995). Therefore, based on the foregoing and the record as a whole, I find that the Pinedas should be included in the unit of operators and operators/foremen.⁴

The Board held in *Steiny & Company, Inc.*, 308 NLRB 1323 (1992), that the *Daniel* formula is applicable in all construction industry elections, unless the parties stipulate to the contrary. See also *Signet Testing Laboratories*, 330 NLRB No. 104 (1999). Here, the parties did not stipulate that the *Daniel/Steiny* formula should not be applied. Accordingly, I find that the *Daniel* formula, as set forth below, is the appropriate eligibility formula to be applied in this case.

The *Daniel* formula to determine eligibility of employees in the construction industry provides that, in addition to those eligible to vote under the traditional standards, laid-off unit employees are eligible to vote in an election if they were employed by the Employer for 30 working days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment by the Employer in those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. Of those eligible under this formula, any employees who quit voluntarily or had been terminated for cause prior to the completion of the last job for which they were employed are excluded and disqualified as eligible voters. *Daniel Construction Co.*, 133 NLRB 264, 267 (1961), modified 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny & Company, Inc.*, 308 NLRB 1323 (1992), overruling *S.K. Whitty & Co.*, 304 NLRB 776 (1991).

At the hearing, the Union stated its willingness to proceed to an election in any unit found appropriate. Since the unit I find appropriate is broader than the petitioned-for unit, the Union is granted fourteen (14) days from the date of this Decision to make an adequate showing of interest, if necessary. Should the Union not wish to proceed to an election in the broader unit it will be permitted, upon request, to withdraw its petition without prejudice.

⁴ There was no evidence presented regarding the classification of "mechanics," which is included in the petitioned-for unit. So far as the record reflects, the Employer does not employ and has not employed mechanics. Therefore, I shall not include mechanics in the unit found appropriate.

In summary, I find the following unit to be appropriate:

All full-time and regular part-time heavy equipment operators and heavy equipment operators/foremen employed by the Employer in the Washington, D.C. Metropolitan Area, but excluding all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An Election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 77, AFL-CIO.**

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by **April 27, 2001**.

Dated April 17, 2001

at Baltimore, Maryland

/s/ WAYNE R. GOLD
Regional Director, Region 5



440-1760-9167-6200
401-7550